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In the Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

PACIFIC COAST WHOLESALERS' ASSOCIATION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Civil No. 8588-WM

PACIFIC COAST WHOLESALERS' ASSOCIATION, A CORPORATION, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT,

and

INTERSTATE COMMERCE COMMISSION AND FREIGHT FORWARDERS INSTITUTE, INTERVENORS

STATEMENT AS TO JURISDICTION

Filed Apr. 12, 1949

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants, United States and Interstate Commerce Commission, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment and decree of the District Court entered in this cause on February 18, 1949. A petition for appeal was filed on April 12, 1949, and is presented to the District Court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the decision in this cause is conferred by the Judicial Code, as revised by the act approved June 25, 1948, effective September 1, 1948, Title 28, U.S. Code, Sections 1253 and 2101 (b), consolidating and continuing the substance of prior provisions of law relating to direct appeals from decisions of three-judge courts in suits to set aside orders of the Interstate Commerce Commission. The following decisions, appeals in which were taken pursuant to such prior provisions thus codified, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in these cases. *United States* v. *Capital Transit Company,* 325 U.S. 357; *United States* v. *Detroit & Cleveland Navigation Company,* 326 U.S. 236; *United States* v. *Pennsylvania Railroad Company,* 323 U.S. 612; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515.

STATUTE INVOLVED

Section 402(c) of Part IV of the Interstate Commerce Act, 49 U.S.C. 1002(c), regulating freight forwarders, as enacted by the Act of May 16, 1942, provides in part:

> The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, * * *

THE ISSUES AND THE RULING BELOW

The question in this appeal is whether the Pacific Coast Wholesalers' Association is entitled to the benefit of the exemption provision of Section 402(c)(1) with respect to its operations in connection with shipments to its members and their customers from non-member consignors when the goods shipped were sold by such non-member consignors to members on a "delivered price" basis, under which it is the contractual responsibility of the non-member seller to bear transportation charges. The Interstate Commerce Commission in an investigation instituted under Section 403(f) of the Act (49 U.S.C. 1003(f)) found that the Association was not entitled to the benefit of the exemption provision of Section 402(c) with respect to such traffic,[1] but that its operations were those of a freight forwarder as defined in Section 402(a)(5) of the Act (49 U.S.C. 1002(a)(5)), holding itself out to the public to provide transportation for hire, and were therefore unlawful, in the absence of a permit as required by Section 410(a) of the Act (49 U.S.C. 1010(a)). The District Court held that the Commission's conclusions were not warranted by the facts found; that the facts found by the Commission admit of but one conclusion, namely that the Association at all times acts solely as agent of the member-purchasers, and hence derives no profit from its operations; that the Association does not hold itself out to the general public to provide transportation of property for

[1] With respect to traffic where members of the Association had purchased goods on an f.o.b. basis and were responsible for bearing the transportation charges, the Commission found that the Association's operations were within the scope of the exemption provision of Section 402(c)(1).

compensation; and that the conclusions and requirements of the Commission were without rational basis and should be set aside.

The facts regarding the transactions between the Association and its members, on the one hand, and non-members of the Association, on the other hand, are not in dispute. The Association collects from non-member consignors who have sold goods to members of the Association on a "delivered price" or "freight allowed" basis an amount equal to what the seller would have had to pay for transportation charges if the shipment had moved at the less-than-carload forwarder rate from origin to final destination. The amount so collected includes an item of 3%, equivalent to the transportation tax on the less-than-carload rate which the Association does not in fact pay, which the consignor seller would have incurred if the shipment had moved using the facilities of commercial forwarders.

From the amounts thus collected from non-member consignors, "refunds" are made to the members involved in the shipments. With regard to these so-called "savings" the Commission found:

> The so-called "savings" are the differences between the charges at the less-than-carload or less-than-truckload forwarder rate from origin to destination, plus 3 percent thereof, on the one hand, and the cost to the association of assembling, consolidating, transporting, and distributing the freight, including the inbound charges to Chicago, the terminal expenses at that point, carload charges from Chicago to destination or break-bulk points, terminal and distributing costs, and transportation taxes, plus additional items charged by the association of 13 cents for administration, 2.25 cents for billing and mailing arrival

notices, and 1.125 cents for insurance, on the other hand.

These differences or "savings" are paid to the member consignees, regardless of the fact that the charges were collected from the consignors.

Upon these facts the Commission concluded that the "refunds" or "savings" distributed to members of the Association out of the amounts collected from non-member consignors constituted profit. The Commission likewise held that since the consignor seller was responsible for bearing the transportation charges on goods sold on a delivered-price or freight-allowed basis, the Association's service was being performed for the non-member consignor rather than for the member consignee. For these reasons, the Commission determined that the Association's operations did not constitute "distributing freight for themselves" or distribution "on a non-profit basis," as required by Section 402(c) in order to obtain the exemption claimed by the Association, but on the contrary amounted to service to the public for hire. The District Court held that the Commission's determination was erroneous as a matter of law.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The question involved in this appeal is novel, and of importance to the industry as well as to the Commission in the administration of the act. The District Court's decision is one of first impression, and it is desirable that the issue should be authoritatively determined, in order that groups of shippers such as the Association, engaged in cooperative distribution of freight, may know the extent to which they may lawfully engage in such activities, without

subjecting themselves to regulation by the Commission as freight forwarders. To regulated freight forwarders it is equally vital to know the extent to which unregulated freight forwarders may lawfully engage in competition with them for available traffic. It is of public importance to the Commission, in the administration of the act, that the scope of regulation be delineated with clarity.

The basic error in the District Court's decision is its misconception of the scope of the exemption provision in Section 402(c) of the Act. The object of that provision was merely to relieve from regulation co-operative associations handling freight "for themselves" with a view of reducing the transportation charges which their members would otherwise be obliged to pay. The exemption provision did not contemplate the use of the facilities of such an association for the purpose of furnishing service to non-members and making a profit by performing that service at less cost than the charge which the non-member would have been obliged to pay if the facilities of regulated commercial freight forwarders had been used, while collecting from such non-member the full amount which would have been paid if regulated forwarder service had been used.

It seems plain that in the instant case no transportation service is performed for the members themselves, but that the Association's service is made available to all such non-member sellers as members may have dealings with. It is equally clear that a profit is made as a result of the Association's operations, such profit being subsequently distributed to the member involved as a "refund" or "saving." The District Court's decision is therefore erroneous in holding that the Association's operations constituted "distributing freight

for themselves" and not for the public at large composed of the suppliers from whom the Association's members made purchases. The decision was likewise erroneous in holding that the Association's operations were conducted "on a non-profit basis."

Conclusive proof of the fact that the Association's operations were not conducted on a non-profit basis is furnished by the fact that the Association collects from the non-member consignor a fictitious item of 3% transportation tax which is never in fact paid to the Government but which amounts to an equalization charge in order to make the amount received by the Association from the non-member consignor equal to what such consignor would have had to pay if the services of a regulated freight forwarder had been used.

If shipments are made using the facilities of a regulated freight forwarder, the forwarder collects from the shipper a 3% transportation tax measured by the forwarder's less-than-carload rate. When the forwarder thus collects the tax, the underlying rail or motor carrier does not do so. When shipments are handled by the Association for non-member consignors however, the underlying rail or motor carrier treats the Association as shipper and collects a tax of 3% on the carload or truckload rate. Thus the Government is never paid, in the case of shipments handled by the Association, the 3% tax on the higher L.C.L. or L.T.L. rate; but the Association collects that amount in full from the consignor and thus profits to the extent of the difference between 3% of the L.C.L. or L.T.L. rate and 3% of the carload or truckload rate. This profit is subsequently distributed to the member involved as a "refund" or "saving." Obviously the Association is here furnishing no service to its members but is merely collecting a fictitious equalization

charge so that the amount received by it from the non-member consignor is exactly equivalent to what the consignor would have had to pay if he had used the services of a regulated freight forwarder. The District Court's decision was clearly erroneous when it failed to recognize that the Association's practice of collecting the fictitious item of 3% demonstrably proved that the Association's operations were not "on a non-profit basis," as required by Section 402(c) of the Act in order to obtain exemption from regulation.

It is thus evident that important issues involving the interpretation and application of the Interstate Commerce Act to freight forwarders are presented by this appeal, and that substantial questions are raised which call for the appropriate exercise of appellate jurisdiction.

Dated April 12, 1949.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 8588-WM

PACIFIC COAST WHOLESALERS' ASSOCIATION, a corporation, and ELMER J. JENSON, PERCY T. LYON, IRA C. LAMBERT, G. A. OLSON and SOL SMITH, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT,

and

INTERSTATE COMMERCE COMMISSION and FREIGHT FORWARDERS INSTITUTE, INTERVENORS

OPINION

Before Stephens, Circuit Judge, and Yankwich and Mathes, District Judges:

MATHES, District Judge:

Plaintiffs, a nonprofit California corporation, and individuals comprising its board of directors, seek by this action "to enjoin, set aside, suspend and annul a certain report, requirement and order of the Interstate Commerce Commission." Jurisdiction of this court is invoked under 28 U.S.C., Sec. 1336 (formerly Sec. 41(28).)

Hearing and determination of the cause by "a district court of three judges" is required by 28 U.S.C., Sec. 2325 (formerly Sec. 47), and this court was accordingly designated by the Chief Judge of the Circuit pursuant to 28 U.S.C., Sec. 2284.

The challenged action of the Commission followed "an inquiry and investigation . . . under Sec. 403(f) of the Interstate Commerce Act, instituted . . . for the purpose of determining whether the operations of the Pacific Coast Wholesalers' Association, a corporation, . . . or of its

directors, officers, or representatives are in violation of any provision of part IV of the act, or of any rule, regulation or requirement issued or established pursuant thereto . . ." (264 I.C.C. 134).

In the language of the Commission's report of November 26, 1945 (264 I.C.C. 134), "the association was formed March 27, 1935, by a small group of dealers in automotive parts at Los Angeles, California, as a voluntary unincorporated, nonprofit association, (and was later incorporated) for the purpose of promoting the interest of its members, and to provide a means of assembling, consolidating, forwarding and distributing freight for its members, on a nonprofit basis, and for the purpose of securing the benefits of carload, truckload, or other volume rates . . . No freight is handled for nonmembers . . . Believing that it was exempt under the provisions of Sec. 402(c) of part IV of the act, neither the association nor the corporation filed an application for a permit to operate as a forwarder."

The report of November 26, 1945, concluded: "It has been established in this proceeding that the traffic handled is for members of the association, that the association was founded and has been operated, in good faith, for the purpose of effecting savings in freight charges for its members by securing the benefits of carload, truckload, or other volume rates, and that the association is operated on a non-profit basis. These are operations of the character contemplated by the exemption referred to, and may be continued without obtaining authority therefor from this Commission." Thereupon the Commission entered an order: "That this proceeding be, and it is hereby, discontinued."

Thereafter, upon petition of Freight Forwarders Institute, as intervenor, the proceedings were reopened and further hearings held. On December 18, 1947, a "Report of the Commission on Further Hearing" was filed (269 I.C.C. 504), setting aside the report of November 26, 1945.

In the second report, the Commission found, inter alia:

"All of the shipments involved are consigned from eastern origins to the association at Chicago upon instructions of the members, and are there consolidated in carloads and forwarded to destinations or break-bulk points and distributed to members of the association or to their customers in the destination areas . . .

"The bills of lading show the association as consignee, and Chicago as destination, with notations thereon showing the ultimate consignee and destination. They also bear, in the space provided therefor, the notations 'prepay', 'prepay through,' 'collect to Chicago and prepay through', or words of similar purport. Most of the freight bills show the charges as having been prepaid. Some of the invoices show deductions for freight allowed; and in other instances where the charges were billed collect, debit memoranda were issued by the member consignees against the consignors for the amount of the charges, or credit memoranda were issued by the consignors in favor of the consignees.

"In most instances, although the bills of lading are endorsed prepaid, the charges were not actually prepaid to the originating carrier at the time of shipment. Under a credit arrangement between the consignor and the association, the goods were billed collect to Chicago, and upon arrival the association advanced the charges to the originating carrier for its haul to Chicago and issued the association's prepaid freight bill from the point of origin to the final destination, and collected the charges from the consignor. If the charges to Chicago actually were prepaid to the originating carrier, the amount paid is credited on the association's freight bill. In other words, the association advances the charges to the

consolidating point and collects from the consignor the forwarder's through less-than-carload rate from origin to destination, plus 3 percent of the total freight charge.

"At destination the freight is delivered to the member consignees or to their non-member customers without additional charge. Thereafter the member is credited with the difference between the amount paid by the consignor, and the costs borne by the association for transportation, administration, handling, distribution, taxes, etc. No refunds are made to the non-member consignors who paid the charges in the manner stated.

". . . The consolidation of such shipments, including those delivered to customers of the members, and the payment to the members of the 'savings' resulting therefrom, is common practice.

"By far the greater part of the traffic is billed to the members as sub-consignees. A relatively minor part is billed to customers of the members at the direction of the latter. All transactions relating to the purchase and sale of the customer goods are between the members and the consignors . . .

"The so-called 'savings' are the differences between the charges at the less-than-carload or less-than-truckload forwarder rate from origin to destination, plus 3 percent thereof, on the one hand, and the cost to the association of assembling, consolidating, transporting, and distributing the freight, including the inbound charges to Chicago, the terminal expenses at that point, carload charges from Chicago to destination or break-bulk points, terminal and distributing costs, and transportation taxes, plus additional items charged by the association of 13 cents for administration, 2.25 cents for billing and mailing arrival notices, and 1.125 cents for insurance, on the other hand.

"These differences or 'savings' are paid to the member consignees, regardless of the fact that the charges were collected from the consignors. Occasionally losses are sustained by the consignees because of the inclusion in the consolidated carloads of goods not subject to carload rates, but generally the association attempts to handle only freight on which a saving may be effected . . .

"The evidence clearly shows, and it is admitted by the members of the association and by its general manager, that 'refunds' are made to the members of a portion of the freight charges paid by non-member consignors."

The Commission thereupon concluded:

"(1) That the association's service in connection with shipments from nonmember-consignors to member-consignees and their customers of goods sold on a f.o.b. destination or delivered-price basis is not a service for the association's members and is not performed on a non-profit basis within the meaning of Sec. 402(c)(1) of the act;

"(2) That the operations of the association as described . . . are those of a freight forwarder in interstate commerce within the meaning of Sec. 402(a)(5) of the act, and that continuance thereof without a permit is in violation of Sec. 410(a) of the act and therefore unlawful; [and]

"(3) That respondents [the individuals] to the extent that they are parties to such unlawful operations, are likewise in violation of Sec. 410(a) of the act."

The "requirements" of the Commission accompanying the report of December 18, 1947, read:

"Respondents will be expected (a) to discontinue on or before March 4, 1948, the operations herein found to be unlawful, and (b) to notify the Commission on or before March

> 19, 1948 in writing under oath that such operations have been discontinued."

The Commission has construed the somewhat equivocal verb phrase "will be expected" to connote a command. [cf. *Rochester Tel. Corp. v. United States,* 307 U. S. 125, 143-144 (1939).]

The petition for reconsideration having been denied, respondents commenced this action on August 30, 1948, to set aside the above quoted requirements. The "effective dates of the aforesaid requirements" have been postponed from time to time by order of the Commission, and now await final judgment herein. Both the Commission and Freight Forwarders Institute have intervened on the side of the defendants and have filed answers and briefs.

The Commission's action in question was taken under the authority of Sec. 403(f) of the Interstate Commerce Act, as amended, (49 U.S.C., Sec. 1003(f)):

> "The Commission may investigate, either upon complaint or upon its own initiative whether any freight forwarder has failed to comply with any provision of this chapter . . . and, after notice and hearing, take appropriate action to compel compliance therewith."

Jurisdiction to set aside a "requirement" of the Commission is conferred upon this court in Sec. 17(9) of the Act (49 U.S.C., Sec. 17(9)):

> "When an application for rehearing . . . or reconsideration of any . . . requirement . . . shall have been denied . . . by the Commission . . ., a suit to enforce, enjoin, suspend, or set aside such . . . requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

See: 28 U.S.C., Sec. 1336 (formerly Sec. 41(28);

cf. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, 417 (1942); *United States* v. *Los Angeles R. R.,* 273 U. S. 299, 309-312 (1927).)

However, as said in *Rochester Tel. Corp.* v. *United States, supra,* 307 U. S. 125, 139-140 (1939), "the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

The full record before the Commission has been brought here, and it appears beyond dispute that there is evidence of substance to support the Commission's findings of fact (*Louisiana etc. Ry. Co.* v. *United States,* 257 U. S. 114, 116 (1921); *I.C.C.* v. *Union Pacific,* 222 U. S. 541, 547-548 (1912)). "The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion . . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." (*Miss. Valley Barge Co.* v. *United States,* 292 U. S. 282, 286-287 (1934).)

The courts will not consider the wisdom of the "requirement" in question, or substitute their judgment for that of the Commission (*Assigned Car Cases,* 274 U. S. 564, 580 (1927); *New England Divisions Case,* 261 U. S. 184, 204 (1923); *I.C.C.* v. *Illinois Central R.R.,* 215 U. S. 452, 470 (1910)). So the precise question here is whether the facts found by the Commission show respondent Pacific Coast Wholesalers' Association to be a "freight forwarder" within the meaning of Sec. 402 of the Interstate Commerce Act (49 U.S.C., Sec. 1002). Section 402(a)(5) provides that:

> "The term 'freight forwarder' means any person which (otherwise than as a carrier

subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, . . . for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8 or 12 of this title."

Section 402(c) of the Act (49 U.S.C., Sec. 1002 (c)) declares that:

"The provisions of this chapter shall not be construed to apply . . . to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . ."

The December 18, 1947 report of the Commission states: "Simple logic would dictate the conclusion that in handling shipments on which freight is borne by nonmember-consignors, the association is operating for hire and therefore for profit." But earlier in the report the Commission found that: "All transactions relating to the purchase and sale of the customer goods are between the members and the consignors." And further that: "These differences or 'savings' are paid to the member consignees, regardless of the fact that the charges were collected from the consignors."

It is true of course, as the Commission points out, that "where goods are f.o.b. destination, it is

ordinarily the seller who bears the freight, who suffers from the excessive charges", and the purchaser who pays the freight does so "solely as agent of the seller" (*Louisville & Nashville R.R. Co.* v. *Sloss-Sheffield etc. Co.*, 269 U. S. 217, 235, 238 (1925)). But those are matters of contract between the seller-consignor and the purchaser-consignee.

Here the determinative inquiry is not as to agency as between consignor-seller and consignee-member (cf. *Adams* v. *Mills*, 286 U. S. 397, 406-407 (1932)), but as to the agency relationship between both or either of them and the association. And the facts found by the Commission admit of but one conclusion as to this: That the association at all times acts solely at the request, and under the direction, and for the account and benefit, of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.

The existence of this agency is implicit in the findings of the Commission. The report states that "All of the shipments involved are consigned . . . upon instructions of the members" of the association. Admittedly, the facilities of the association are not available to a nonmember shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.

When this principal-agent relationship between member-purchaser and the association is borne in mind it is clear that there is no profit to the association from the activities described in the Commission's report (49 U.S.C., Sec. 1002(c)); and it is equally clear that the association, as agent for

the members, does not "hold itself out to the general public to . . . provide transportation of property . . . for compensation" (49 U.S.C., Sec. 1002(a)(5)).

The court is of opinion therefore that inasmuch as respondent association acts only as agent of its members "in consolidating or distributing freight . . . for the members . . . on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates," respondents are not subject to regulation in such activities by the Commission pursuant to part IV of the Interstate Commerce Act. Which is to say that the conclusions reached by the Commission in the report of November 26, 1945 (264 I.C.C. 134) were correct.

Accordingly the court holds that the conclusions and requirements of the Commission, predicated upon the report of December 18, 1947 (269 I.C.C. 504), have no rational basis, and must be set aside.

Plaintiffs will submit findings of fact, conclusions of law and judgment setting aside the requirements of the Commission as prayed for, pursuant to local rule 7 within ten days.

January 24, 1949.

ALBERT LEE STEPHENS,
Circuit Judge.

LEON R. YANKWICH,
District Judge.

WM. C. MATHES,
District Judge.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Hugh Gordon, Gordon, Knapp and Hennessy, 453 South Spring Street, Los Angeles 13, California, Michigan 1997, Attorneys for plaintiffs.

No. 8588-WM

PACIFIC COAST WHOLESALERS' ASSOCIATION, a Corporation, and ELMER J. JENSEN, PERCY T. LYON, IRA C. LAMBERT, G. A. OLSON and SOL SMITH, *Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant,*

and

INTERSTATE COMMERCE COMMISSION and FREIGHT FORWARDERS INSTITUTE, Intervenors

Findings of Fact and Conclusions of Law

The above entitled cause came on regularly for trial on October 26, 1948, before a special court composed of three judges, the Honorable Albert Lee Stephens, Circuit Judge presiding, and Honorable Judges Leon R. Yankwich and William C. Mathes, District Judges; Hugh Gordon and Gordon, Knapp and Hennessy appearing by Hugh Gordon as counsel for plaintiffs; Herbert A. Bergson, Assistant Attorney General, Edward Dumbauld, Special Assistant to the Attorney General, James N. Carter, United States Attorney, Clyde C. Downing, Assistant United States Attorney, and James C. R. McCall, Jr., Assistant United States Attorney appearing by Edward Dumbauld as counsel for the defendant, the United States of America; Daniel W. Knowlton, Chief Counsel of the Interstate Commerce Commission and H. L. Underwood, Attorney for the Interstate Commerce Commission

appearing by H. L. Underwood for the Interstate Commerce Commission, Intervenor; and Messrs. Harry C. Ames and Giles Morrow appearing by Giles Morrow for Freight Forwarders Institute, Intervenor;

Said court having examined the pleadings submitted by the respective parties and the full record of the proceeding before the Interstate Commerce Commission culminating in the "Report of the Commission on Further Hearing" filed December 18, 1947, and reported in 269 I.C.C. 504; and said court having heard the arguments of said respective parties; and

Said court having fully considered such pleadings, record, and argument and having heretofore filed herein its written opinion, and good cause appearing;

NOW, THEREFORE, said court makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff, Pacific Coast Wholesalers' Association, is a non-profit corporation organized pursuant to the provisions of Division First, Part IV, Title XII of the Civil Code of the State of California and has its principal place of business in Los Angeles, California. It has no capital stock, does not earn or declare dividends and membership therein, limited under the by-laws to fifty, is evidenced by non-transferable membership certificates.

2. Plaintiffs, Elmer J. Jensen, Percy T. Lyon and Ira C. Lambert, members of the Board of Directors, and G. A. Olson and Sol Smith, employees of said Association, are residents of the Southern District of California.

3. The members of the said Association are and at all times referred to herein have been engaged in business in the states of California, Oregon, Washington, Utah and Arizona, as wholesalers of auto-

motive parts, machinery, hardware and other articles of property, purchased by said members from manufacturers or other suppliers located at various points east of Chicago, Illinois, and who are not members of the said Association.

4. All transactions relating to the purchase and sale of the goods comprising the said shipments are between the members of the Association, as purchasers, and the non-member consignors, as sellers, whereby provision is made in some instances for payment by the sellers, as a credit on the purchase price of the goods, of all or some portion of the amount of freight charges which would accrue on each shipment if transported under the prevailing freight forwarder rates applicable to such shipment from origin to final destination.

5. Said Association was organized and is operated to provide a means of assembling, consolidating, forwarding, and distributing freight for its members on a non-profit basis for the purpose of securing for its members the benefits of car load, truck load and other volume rates and the freight so assembled, consolidated, forwarded and distributed by the Association is comprised exclusively of property purchased by its members as aforesaid from manufacturers and other suppliers east of Chicago, Illinois.

6. At destination the freight is delivered by the Association to the member consignees or their customers and thereafter the member is credited with the difference between the amount paid by the consignor for the account of the member and the costs borne by the Association for transportation, administration, handling, distribution, taxes, and other incidental costs. No refunds are made to the non-member consignors who paid freight charges or made freight allowances in the manner aforesaid.

7. The facilities of the Association are not available to a non-member shipper otherwise than

through arrangements made by a member wherein the member instructs the Association to handle the shipment comprising goods purchased by and consigned to such member or to a customer of such member.

8. By order dated May 6, 1944, the Interstate Commerce Commission instituted a proceeding of inquiry and investigation under Section 403 (f) of the Interstate Commerce Act for the purpose of determining whether the operations of Pacific Coast Wholesalers' Association, a corporation, or its directors, officers, or representatives are in violation of any provision of Part IV of said Act or of any rule, regulation, or requirement issued or established pursuant thereto. Said proceeding is docketed and designated in the files of the Interstate Commerce Commission as "Ex Parte 160—Pacific Coast Wholesalers' Association—Investigation of Status."

9. Hearings were held in said proceeding, Ex Parte 160, evidence both oral and documentary was received, briefs filed and oral argument had, following which the Interstate Commerce Commission, on December 18, 1947, rendered its Report wherein the Commission stated its Findings of Fact the substance and effect of which are contained in the Findings of Fact of the Court herein, and concluded therefrom as follows:

> "(1) That the Association's service in connection with shipments from non-member-consignors to member-consignees and their customers of goods sold on a f.o.b. destination or delivered-price basis is not a service for the Association's members and is not performed on a non-profit basis within the meaning of Sec. 402 (c)(1) of the Act;
>
> (2) That the operations of the Association as described . . . are those of a freight forwarder in interstate commerce within the meaning of Sec. 402 (a)(5) of the Act, and

that continuance thereof without a permit is in violation of Sec. 410 (a) of the Act and therefore unlawful; (and)

(3) That respondents (the individuals) to the intent that they are parties to such unlawful operations, are likewise in violation of Sec. 410 (a) of the Act."

10. By its said Report of December 18, 1947, the Interstate Commerce Commission further set forth its requirements that on or before certain specified dates respondents discontinue the operations found by said Report to be unlawful and to notify the Commission in writing, under oath, that such operations had been discontinued.

11. Thereafter a Petition for Reconsideration was duly filed by respondents in said proceeding before the Interstate Commerce Commission which petition was denied by the Commission prior to the commencement of this action wherein the said respondents, as plaintiffs herein, invoke the jurisdiction of this court under 28 U.S.C. Sec. 1336 and 49 U.S.C. Sec. 17 (9) to enjoin, set aside, suspend, and annul the said Report and Requirements of the Interstate Commerce Commission rendered December 18, 1947, in said proceeding, Ex Parte 160.

Conclusions of Law

1. The Association in assembling, consolidating, forwarding, and distributing freight for its members including shipments from non member consignors to member consignees and their customers of goods sold on a f.o.b. destination or delivered price basis acts exclusively as the agent of the member consignees and not as the agent of the non member consignors.

2. There is no profit to the Association resulting from its activities as the transportation agent of its members in assembling, consolidating, forwarding, and distributing freight for its said members.

3. The Association in its said activities as transportation agent of its members does not hold itself out to the general public to provide transportation of property for compensation.

4. The Association's services in connection with shipments from non member-consignors to member-consignees and their customers of goods sold on a f.o.b. destination or delivered price basis is a service for the Association's members and is performed on a non profit basis within the meaning of Section 402 (c) (1) of the Interstate Commerce Act.

5. The operations of the Association, its directors, officers and employees in assembling, consolidating, forwarding, and distributing freight for the members of the Association are not those of a freight forwarder in interstate commerce within the meaning of Section 402 (a) (5) of the Interstate Commerce Act and continuance thereof without a permit issued by said Commission is not in violation of Section 410 (a) of the Interstate Commerce Act or otherwise unlawful.

The conclusions and requirements of the Interstate Commerce Commission predicated upon its Report of December 18, 1947, in its proceeding Ex Parte 160 have no rational basis and should be set aside.

Dated: February 18, 1949.

ALBERT LEE STEPHENS,
Circuit Judge;
LEON R. YANKWICH,
District Judge;
WILLIAM C. MATHES,
District Judge.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA,
County of Los Angeles, ss.

Georgia Walker being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party

to the within above entitled action; that affiant's business address is 453 South Spring Street, Rm. 612, Los Angeles 13, California, that on the 3rd day of February, 1949, affiant served the within Findings of Fact and Conclusions of Law on the intervenors in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said intervenors at the office address of said attorneys as follows:

Counsel for Intervenor, Interstate Commerce Commission, Daniel W. Knowlton, Chief Counsel; H. L. Underwood, Attorney, 3329 Interstate Commerce Building, Washington 25, D. C.

Counsel for Intervenor, Freight Forwarders Institute, Messrs. Harry C. Ames and Giles Morrow, Transportation Building, Washington 6, D. C.

and by then sealing said envelope and depositing the same by air mail, special delivery, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the persons by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

(s.) GEORGIA WALKER.

Subscribed and sworn to before me this 3rd day of February, 1949. (s.) Agnes T. Runyard, Notary Public in and for said County and State. (Seal.)

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

Hugh Gordon, Gordon, Knapp and Hennessy, 453 South Spring Street, Los Angeles 13, California, Michigan 1997, Attorneys for plaintiffs.

No. 8588-WM

PACIFIC COAST WHOLESALERS' ASSOCIATION, a Corporation, and ELMER J. JENSEN, PERCY T. LYON, IRA C. LAMBERT, G. A. OLSON and SOL SMITH, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT,

and

INTERSTATE COMMERCE COMMISSION and FREIGHT FORWARDERS INSTITUTE, INTERVENORS

DECREE ANNULLING, SETTING ASIDE AND ENJOINING ENFORCEMENT OF REQUIREMENT BY INTERSTATE COMMERCE COMMISSION

The above entitled cause came on regularly for trial on October 26, 1948, before a special court composed of three judges, the Honorable Albert Lee Stephens, Circuit Judge presiding, and Honorable Judges Leon R. Yankwich and William C. Mathes, District Judges; Hugh Gordon and Gordon, Knapp and Hennessy appearing by Hugh Gordon as counsel for plaintiffs; Herbert A. Bergson, Assistant Attorney General, Edward Dumbauld, Special Assistant to the Attorney General, James M. Carter, United States Attorney, Clyde C. Downing, Assistant United States Attorney, and James C. R. McCall, Jr., Assistant United States Attorney appearing by Edward Dumbauld as counsel for the defendant, the United States of America; Daniel W. Knowlton, Chief Counsel of the Interstate Commerce Commission and H. L. Underwood, Attorney for the Interstate Commerce Commission appearing by H. L. Underwood for

the Interstate Commerce Commission, Intervenor; and Messrs. Harry C. Ames and Giles Morrow appearing by Giles Morrow for Freight Forwarders Institute, Intervenor;

Said court having examined the pleadings submitted by the respective parties and the full record of the proceeding before the Interstate Commerce Commission culminating in the "Report of the Commission on Further Hearing" filed December 18, 1947, and reported in 269 I.C.C. 504; and said court having heard the arguments of said respective parties; and

Said court having fully considered such pleadings, record, and argument, and having heretofore filed herein its written opinion and Findings of Fact and Conclusions of Law; and good cause appearing;

NOW THEREFORE, it is hereby decreed as follows:

That the requirements of the Interstate Commerce Commission as set forth in the Report of the Commission on Further Hearing, filed December 18, 1947, in its proceeding, Ex Parte 160, that the respondents therein discontinue the operations found by said Report to be unlawful, and notify the Commission in writing, under oath, that such operations have been discontinued be and the same are hereby set aside and annulled and the enforcement thereof is hereby permanently enjoined.

Dated: February 18, 1949.

ALBERT LEE STEPHENS,
Circuit Judge;
LEON R. YANKWICH,
District Judge;
WILLIAM C. MATHES,
District Judge.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA,
County of Los Angeles, ss.

Georgia Walker being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant

is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 453 South Spring Street, Rm. 612, Los Angeles 13, California, that on the 3rd day of February, 1949, affiant served the within Decree Annulling, Setting Aside and Enjoining Enforcement of Requirement By Interstate Commerce Commission on the intervenors in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said intervenors at the office address of said attorneys as follows:

Counsel for Intervenor, Interstate Commerce Commission, Daniel W. Knowlton, Chief Counsel, H. L. Underwood, Attorney, 3329 Interstate Commerce Building, Washington 25, D. C.

Counsel for Intervenor, Freight Forwarders Institute, Messrs. Harry C. Ames and Giles Morrow, Transportation Building, Washington 6. D. C.

and by then sealing said envelope and depositing the same by air mail, special delivery, with postage thereon fully prepaid in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the persons by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

(s.) GEORGIA WALKER.

Subscribed and sworn to before me this 3rd day of February, 1949. (s.) Agnes T. Runyard, Notary Public in and for said County and State. (Seal.)

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